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**BEFORE THE
STATE BOARD OF EMBALMERS AND FUNERAL DIRECTORS
STATE OF MISSOURI**

STATE BOARD OF EMBALMERS AND
FUNERAL DIRECTORS,

Petitioner,

v.

ROSS E. JOHNSON, JR.,
ROBERT J. JOHNSON,
ESTATE OF ROSS E. JOHNSON, SR.,
and JOHNSON FUNERAL HOMES,

Respondent.

No. 04-0407 EM

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND DISCIPLINARY ORDER**

Statement of the Case

On June 14, 2006, the Administrative Hearing Commission issued its Decision in the case of *State Board of Embalmers and Funeral Directors v. Johnson, et. al.*, Case No. 04-0407 EM. In its Decision, the Administrative Hearing Commission found cause to discipline the funeral director and embalmer licenses of Respondent Ross E. Johnson, Jr., and Respondent Robert J. Johnson pursuant to § 333.121.2(4), (5), (13) and (15),

RSMo 2000.¹ The Administrative Hearing Commission also found in its Decision cause to discipline the funeral establishment licenses of Respondents, doing business as and/or in the name of Johnson Funeral Homes, pursuant to § 333.121.2(4), (5), (13) and (15), RSMo 2000.

The Board has received and reviewed the record of the proceedings before the Administrative Hearing Commission. The Decision of the Administrative Hearing Commission is incorporated herein by reference.

Pursuant to notice and § 621.110 and § 333.121.3, RSMo, the Board held a hearing on August 28, 2006, at 4:00 p.m. at the Country Club Hotel, Route HH & Carol Road, Lake Ozark, Missouri, for the purpose of determining the appropriate disciplinary action against Respondents' licenses. The Board was represented by Sharon Euler, Assistant Attorney General. Respondent Robert J. Johnson was present for the hearing and represented by counsel. All other Respondents were not present for the hearing and were not represented by counsel. After being present and considering all of the evidence presented during the hearing, the Board issues the following Findings of Facts, Conclusions of Law and Order.

Findings of Fact

1. Respondent Ross E. Johnson, Jr. is a former Missouri licensed funeral director (license #004910) and embalmer (license #006379). At all times mentioned herein, Respondent Ross E. Johnson, Jr.'s, funeral director and embalmer licenses were current and active.

¹ All statutory references included herein are to the 2000 Revised Statutes of Missouri, except as otherwise provided.

2. Respondent Robert J. Johnson, is a former Missouri licensed funeral director (license #004909) and embalmer (license #006378). At all times mentioned herein, Respondent Robert Johnson's funeral director and embalmer licenses were current and active.

3. The Board issued funeral establishment licenses to the Respondents in the name of Johnson Funeral Homes for establishments located at 2nd and Elm Street in Stanberry, Missouri (license #001972), and at 951 S. Main in Maryville, Missouri (license #001974). As reflected in the records of the Board, the registered owners of Johnson Funeral Homes were Ross E. Johnson Sr., Ross E. Johnson, Jr. and Robert Johnson.

4. The Board hereby adopts and incorporates herein the findings of fact contained in the Decision of the Administrative Hearing Commission in *Missouri Real Estate Appraisers Commission v. Johnson, et. al.*, Case No. 04-0407 EM.

5. In its June 14, 2006, Decision, the Administrative Hearing Commission found the Board has grounds to discipline the funeral director and embalmer licenses of Respondents. Ross E. Johnson, Jr., and Robert Johnson pursuant to § 333.121.2 (4), (5), (13) and (14), RSMo 2000.

6. In its June 14, 2006, Decision, the Administrative Hearing Commission found the Board also has grounds to discipline the funeral establishment licenses of the Respondents, doing business as Johnson Funeral Homes, pursuant to § 333.121.2 (4), (5), (13) and (14), RSMo 2000.

7. The Board set this matter for disciplinary hearing and served notice of the disciplinary hearing upon all Respondents in a proper and timely fashion.

III.

CONCLUSIONS OF LAW

8. This Board has jurisdiction over this proceeding pursuant to § 621.110 and § 333.121.3, RSMo.

9. The Board expressly adopts and incorporates by reference the Conclusions of Law in the Decision of the Administrative Hearing Commission in *Missouri Real Estate Appraisers Commission v. Johnson, et. al.*, Case No. 04-0407 EM, finding cause to discipline the applicable funeral director, embalmer and/or funeral establishment licenses of Respondents pursuant to § 333.121.2 (4), (5), (13) and (14), RSMo 2000.

10. As a result of the foregoing, and as identified in the Decision of the Administrative Hearing Commission, the funeral director and embalmer licenses of Respondents Ross E. Johnson, Jr., and Robert Johnson are subject to disciplinary action by the Board, pursuant to § 333.121.2 (4), (5), (13) and (14), RSMo 2000.

11. As a result of the foregoing, and as identified in the Decision of the Administrative Hearing Commission, the funeral establishment licenses of the Respondents, doing business as Johnson Funeral Homes, are subject to disciplinary action by the Board, pursuant to § 333.121.2 (4), (5), (13) and (14), RSMo 2000.

IV.

Order

12. Having fully considered all the evidence before the Board, and giving full weight to the Decision of the Administrative Hearing Commission, it is the **ORDER** of the Board, that the funeral director and embalmer licenses of Respondents Ross E.


Johnson, Jr., and Robert Johnson are hereby **REVOKED** from the effective date of this Order. Upon receipt of this Order, Respondents shall immediately return their licenses to the Board.

13. Further, having fully considered all the evidence before the Board, and giving full weight to the Decision of the Administrative Hearing Commission, it is the **ORDER** of the Board, that the funeral establishment licenses issued to Respondents for Johnson Funeral Homes are hereby **REVOKED** from the effective date of this Order. Upon receipt of this Order, Respondents shall immediately return the licenses for Johnson Funeral Homes to the Board.

14. The Board has determined that this Order is necessary to ensure the protection of the public.

15. The Board will maintain this Order as an open record of the Board as provided in Chapters 333, 610 and 620, RSMo (as amended).

SO ORDERED, EFFECTIVE THIS 25 day of September, 2006.



Becky Dunn, Executive Director
Missouri State Board of
Embalmers and Funeral Directors

Before the
Administrative Hearing Commission
State of Missouri



STATE BOARD OF EMBALMERS
AND FUNERAL DIRECTORS,

Petitioner,

vs.

ROSS E. JOHNSON, JR.,
ROBERT J. JOHNSON,
ESTATE OF ROSS E. JOHNSON, SR.,
and JOHNSON FUNERAL HOMES,

Respondents.

No. 04-0407 EM

DECISION

The State Board of Embalmers and Funeral Directors ("the Board") may discipline Ross E. Johnson Jr., Robert J. Johnson ("the Johnsons"), and the Estate of Ross E. Johnson, Sr., ("the Estate") because they fraudulently diverted monies under preneed funeral service ("preneed") contracts.

Procedure

The Board filed its complaint on March 29, 2004. The Estate received notice of this case, a copy of the complaint, and notice of the hearing by certified mail on April 2, 2004. Through its administrator de bonis non, and with express authorization of the probate division of the

Nodaway County circuit court ("the probate court"),¹ the Estate elected to take no action on the complaint. In the order authorizing that election, the probate court found that no harm could accrue to the Estate.

After granting several continuances requested by the Board and the Johnsons, we convened a hearing on the complaint on November 4, 2005. Assistant Attorney General Sharon Euler represented the Board.² At the Johnsons' request, we re-convened the hearing on January 9 and 10, 2006.

Ross E. Johnson, Jr., appeared and presented his case on January 10, 2006. We left the record open for him to file a notarized copy of Petitioner's Exhibit 28. He filed that document with his written argument on January 24, 2006.

Robert J. Johnson informed the Board that he did not intend to appear at the re-convened hearing. He did not seek a further continuance of the hearing dates and made no appearance. At his request, we extended his time to file written argument. Robert J. Johnson filed written argument on May 15, 2006. His written argument includes testimony and copies of documents. On the basis of that material, he argues that he is not subject to discipline.

The Board filed its reply to Robert J. Johnson's written argument on May 30, 2006. The Board's reply includes a motion to strike the evidence proffered in Robert J. Johnson's written argument. We grant that motion because, though the technical rules of evidence do not apply in a contested case, we must apply the fundamental rules of evidence.³ Robert J. Johnson has not complied with the statutory requirements for entering evidence into the record and chose not to offer his testimony and documents into the record on any of the hearing dates, where the Board

¹*In re Estate of Johnson*, Case No. CV1197-33P (Nodaway County Cir. Ct. order dated April 14, 2004).

²On that hearing date, the Board entered documents into the record. Most of such documents relate to the status of licenses and registrations that the Board issued, which the Board may prove by simply filing an affidavit under § 621.100.2. Statutory references are to the 2000 Revised Statutes of Missouri.

³*Lagud v. Kansas City Bd. of Police Comm'rs*, 136 S.W.3d 786, 792 (Mo. banc 2004).

could challenge – and we could assess – its probity.⁴ We exclude Robert J. Johnson's proffered evidence from the record. We base our findings of fact only on matters admitted into the record.⁵

Having read the full record including all the evidence, Commissioner Terry M. Jarrett makes the decision.⁶

Findings of Fact

1. The Board issued a funeral director license and an embalmer license to Ross E. Johnson, Jr., and a funeral director license and an embalmer license to Robert J. Johnson. The Johnsons' funeral director licenses and embalmer licenses were current and active at all relevant times. The Johnsons and Ross E. Johnson, Sr., did business as "Johnson Funeral Homes."

2. The Johnsons and Ross E. Johnson, Sr., registered the fictitious name of "Johnson Funeral Homes" with the Missouri Secretary of State. The Board issued funeral establishment licenses and preneed provider registrations in the name of Johnson Funeral Homes for each of two locations: 2nd and Elm in Stanberry, Missouri; and 951 S. Main in Maryville, Missouri. The Board also issued a preneed seller registration in the name of "National Security Trusts," an unregistered fictitious name for the Johnsons and Ross E. Johnson, Sr.

3. The Johnsons and Ross E. Johnson, Sr., sold preneed funeral services on their own behalf and on behalf of National Prearranged Services, Inc. They induced clients to pay for preneed services by representing that the money would go into preneed trust accounts, and that they would retain no more than specified amounts. National Prearranged Services, Inc., put the monies it received from the Johnsons and Ross E. Johnson, Sr., into preneed trust accounts on receiving the funds.

⁴See, e.g., § 536.070.

⁵*Hartley v. Spring River Christian Village*, 941 S.W.2d 4, 7 (Mo. App., S.D. 1997).

⁶Section 536.080.2

4. The Johnsons and Ross E. Johnson, Sr., did not always forward monies due to National Prearranged Services, Inc. They deposited some such monies, and monies for preneed services they sold on their own behalf, into their general business accounts for their own use. They had no preneed trust accounts of their own.

5. Ross E. Johnson, Sr., died intestate on March 11, 1997. On April 14, 1997, Ross E. Johnson, Jr., was appointed executor of the Estate. The Johnsons and the Estate, as directed by Ross E. Johnson, Jr., continued the funeral establishment, preneed provider, and preneed seller businesses at both Johnson Funeral Homes locations. Ross E. Johnson, Jr., registered as the funeral director in charge of both locations. Ross E. Johnson, Jr., was also the manager of National Security Trusts.

6. The Johnsons and the Estate failed to deposit into trust accounts, and retained in greater amounts than allowed, preneed monies in the same fashion as before Ross E. Johnson, Sr., died. The conduct of the Johnsons, Ross E. Johnson, Sr., and the Estate damaged preneed clients in the following amounts:

<u>Client</u>	<u>Amount</u>
RN	\$4,664.67
AH	\$7,040.51
LH	\$7,040.51
OL	\$7,522.00
VL	\$7,522.00
RR	\$2,255.00
VW	\$1,418.00
BS	\$ 500.00
DLB	\$9,934.06
ZE	\$6,351.89
CAM	\$2,462.00

On those grounds, the Missouri Attorney General filed an action⁷ in the Circuit Court of Nodaway County ("the circuit court") against the Johnsons and the Estate on March 4, 2003, alleging violations of Chapter 436, RSMo.

7. On July 20, 2003, Ross E. Johnson, Jr., resigned as the funeral director in charge of both Johnson Funeral Homes locations. On July 23, 2003, the probate court replaced Ross E. Johnson, Jr., as executor of the Estate for failure to discharge his duties, including making annual reports, applying for an order allowing the continuance of business, and filing an adequate inventory of the Estate's assets.⁸ Ross E. Johnson, Jr., never filed an inventory of the Estate's assets that included any of its preneed contracts.

8. On October 31, 2003, the preneed provider registrations and preneed seller registration issued in the name of Johnson Funeral Homes lapsed, meaning that it was subject to renewal with less process than an application for a new license for two years, and has since expired. The funeral establishment licenses issued in the name of Johnson Funeral Homes, and the funeral director license and embalmer license of Ross E. Johnson, Jr., lapsed on December 31, 2003, and have since expired. On May 31, 2004, Robert J. Johnson's funeral director license and embalmer license lapsed.

9. The court entered judgments in the circuit court case against the Johnsons⁹ and the Estate.¹⁰ The judgments permanently enjoined the Johnsons and the Estate from certain merchandising practices and ordered them to pay restitution. The court based each judgment on its

⁷*State of Missouri v. Johnson*, Case No. CV703-48CC (Aug. 18, 2004).

⁸*In re Estate of Johnson*, Case No. CV1197-33P (Nodaway County Cir. Ct. order dated July 23, 2003).

⁹February 11, 2004. In that case, both of the Johnsons filed Joint Stipulations for Consent Judgments, in which they stipulated that they violated provisions of Chapters 436 and 407, RSMo.

¹⁰August 18, 2004.

finding that the Johnsons and the Estate failed to place in trust monies received, and retained more monies than allowed, under preneed contracts in violation of §§ 436.021.1 and 436.027.

Conclusions of Law

We have such jurisdiction as the legislature has given us, but no more than that.¹¹ Ross

E. Johnson, Jr., asks us to order the Board to change a regulation, but the legislature has given us no such authority. We have jurisdiction to make:

a finding in any cause charged by the complaint for which the license may be suspended or revoked as provided in the statutes and regulations relating to the profession or vocation of the licensee¹²

under law providing that:

[t]he board may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621, RSMo, against any holder of any certificate of registration or authority, permit or license required by this chapter or any person who has failed to renew or has surrendered his certificate of registration or authority, permit or license¹³

That statute gives us jurisdiction to determine the relief that the complaint seeks: discipline of the funeral director, embalmer, and funeral establishment licenses issued in the names of the Johnsons and Johnson Funeral Homes.¹⁴

The Board has shown that it licensed the Johnsons as funeral directors and embalmers. The Board has also shown that it issued funeral establishment licenses in the name of Johnson

¹¹ *State Bd. of Regis'n for the Healing Arts v. Masters*, 512 S.W.2d 150, 161 (Mo. App., K.C.D. 1974).

¹² Section 621.110.

¹³ Section 333.121.2.

¹⁴ The Board also issued preneed provider registrations, and a preneed seller registration, in the names of Johnson Funeral Homes and National Security Trusts. Those names were trade names for the Johnsons and the Estate, so we conclude that the Johnsons and the Estate held those registrations. But the complaint does not seek, or charge any cause, to discipline the preneed provider registrations and preneed seller registration as § 436.063 provides.

Funeral Homes, which was a trade name for the Johnsons and the Estate.¹⁵ Therefore, we conclude that the Johnsons and the Estate held the funeral establishment licenses.¹⁶

The Board has the burden to prove facts on which the law allows discipline.¹⁷ The Board supports its allegations with documents showing that that the Johnsons and the Estate fraudulently failed to place monies in trust accounts, and retained more monies than allowed, under preneed funeral service contracts. At the hearing, Ross E. Johnson, Jr., testified that a former employee stole all the monies at issue,¹⁸ but he offered no evidence other than that general statement.¹⁹ The Board's evidence proves the conduct it alleges.

A. Statutory Violations

The Board argues that such conduct is cause for discipline as a:

[v]iolation of any of the provisions of . . . chapter 436, RSMo;[²⁰]

which licenses and regulates preneed sellers and providers. The Board cites the provisions requiring a preneed seller or provider to:

[h]ave established, as grantor, a preneed trust or trusts with terms consistent with sections 436.005 to 436.071;[²¹]

¹⁵Ross E. Johnson, Jr., cites the Board's Regulation 4 CSR 120-2.070(9)(A), which states that a change of ownership caused by an owner's death, without the addition of a new owner, does not necessitate a new establishment license. He appears to be defending against a charge of unlicensed operation of Johnson Funeral Homes, or fraudulently obtaining a license by listing Ross E. Johnson, Sr., as an owner of Johnson Funeral Homes. But no such charge appears in the Board's complaint.

¹⁶Ross E. Johnson, Jr., alleges that an order of the probate court determined that the Estate owned all Johnson Funeral Homes, but he has shown us no such order, even though we left the record open for him to do so. He refers to the circuit court's judgment dated August 18, 2004. That order expressly acknowledges that the Estate, Ross E. Johnson, Jr., and Robert J. Johnson all owned part of the Johnson Funeral Homes businesses.

¹⁷*Missouri Real Estate Comm'n v. Berger*, 764 S.W.2d 706, 711 (Mo. App., E.D. 1989).

¹⁸Robert J. Johnson makes an identical accusation against Ross E. Johnson, Jr.

¹⁹The complaint refers to a variety of documents from other actions that set forth additional allegations, but the complaint alleges only one course of conduct clearly enough to give notice of the issue in this action: failing to place monies in trust and retaining more than allowed. See *Duncan v. Missouri Bd. for Arch'ts, Prof'l Eng'rs & Land Surv'rs*, 744 S.W.2d 524, 538-39 (Mo. App., E.D. 1988); Regulation 1 CSR 15-3.350(2)(A)3.

²⁰Section 333.121.2(15).

²¹Section 436.021.1(2). The complaint cites generally to § 436.021, which is 891 words long. The circuit court's judgment cites subsection § 436.021.1, and the only provision that addresses the record is § 436.021.1(2).

and that:

[t]he seller may retain as his own money . . . an amount not to exceed twenty percent of the total amount agreed to be paid by the purchaser of such prepaid funeral benefits as such total amount is reflected in the contract.^{22]}

The Johnsons and the Estate violated those provisions because they had no trust accounts for placing monies from preneed contracts, and they retained monies in amounts greater than allowed. Therefore, we conclude that the Johnsons and the Estate are subject to discipline for violating provisions of Chapter 436, RSMo.

B. Fraud and Other Professional Standards

The Board cites provisions of the statute that allows discipline if the Board shows conduct:

in the performance of the functions or duties of any profession licensed or regulated by this chapter [333, RSMo.^{23]}

Chapter 333, RSMo, licenses or regulates the professions of a funeral director, embalmer and funeral establishment, but not preneed selling or providing.²⁴ The Board does not address the required connection between the professional conduct and the licenses at issue. Our independent research discloses that knowledge of preneed contracts is required for licensing as a funeral director,²⁵ which also includes operating a funeral establishment. Thus, preneed business is a function of the funeral director and funeral establishment professions, which are licensed and regulated by Chapter 333, RSMo. Therefore, we conclude that preneed business conduct can be cause for discipline of a license under Chapter 333.

²²Section 436.027.

²³Section 333.121.2(5).

²⁴Sections 436.015.1(2) and 436.021.1(3).

²⁵Section 333.042.1.

The Board argues that the Johnsons and the Estate are subject to discipline for:

(4) Obtaining or attempting to obtain any fee, charge, tuition or other compensation by fraud, deception or misrepresentation;

(5) . . . fraud, misrepresentation or dishonesty in the performance of the functions or duties of any profession licensed or regulated by this chapter [333, RSMo.²⁶]

Fraud is an intentional perversion of truth to induce another to act in reliance upon it.²⁷

Deception is the act of causing someone to accept as true what is not true.²⁸ Misrepresentation is a falsehood or untruth made with the intent of deceit rather than inadvertent mistake.²⁹

Dishonesty includes actions that reflect adversely on trustworthiness.³⁰

The Board notes that in the circuit court case the Johnsons admitted, and the circuit court concluded, that they violated the following statute on merchandising practices:

The . . . use . . . of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale . . . of any merchandise in trade or commerce . . . in or from the state of Missouri, is declared to be an unlawful practice.^[31]

The Johnsons and the Estate induced their clients to buy preneed services with false promises that the money would go into preneed trust accounts, and that they would retain no more than specified amounts. That conduct constitutes fraud, deception, misrepresentation and dishonesty in the performance of the functions of preneed service selling. Therefore, we conclude that the Johnsons and the Estate are subject to discipline for obtaining fees by fraud, deception,

²⁶Section 333.121.2.

²⁷*Hernandez v. State Bd. of Regis'n for Healing Arts*, 936 S.W.2d 894, 899 n.2 (Mo. App., W.D. 1997).

²⁸MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 298 (10th ed. 1993).

²⁹*Hernandez*, 936 S.W.2d at 899 n.3.

³⁰*See In re Duncan*, 844 S.W.2d 443, 444 (Mo. banc 1992).

³¹Section 407.020.1.

misrepresentation or dishonesty in the performance of the functions of a profession licensed by Chapter 436, RSMo.

The Board also argues that failing to place preneed monies into trust accounts and retaining more than the law allowed is cause for discipline as:

[i]ncompetency, misconduct, [or] gross negligence . . . in the performance of the functions or duties of any profession licensed or regulated by this chapter [333, RSMo.³²]

Incompetency is a general lack of professional ability, or a lack of disposition to use an otherwise sufficient professional ability.³³ The fraud committed by the Johnsons and the Estate shows that they generally lack the disposition to administer preneed funds properly. We conclude that the Johnsons and the Estate are subject to discipline for incompetency.

But the mental states for misconduct and gross negligence are mutually exclusive. Misconduct means the willful doing of an act with a wrongful intention.³⁴ Gross negligence is a gross deviation from the standard of care demonstrating a conscious indifference to a professional duty.³⁵ Fraud is an intentional act. Therefore, we conclude that the Johnsons and the Estate are subject to discipline for misconduct and not merely for gross negligence.

C. Professional Trust

The Board argues that the Johnsons and the Estate are subject to discipline for:

[v]iolation of any professional trust or confidence[.³⁶]

Professional trust is the reliance on the special knowledge and skills that professional licensure evidences.³⁷ We infer that preneed clients relied on special knowledge and skills of the Johnsons

³²Section 333.121.2(5).

³³Section 1.020(8); *Johnson v. Missouri Bd. of Nursing Adm'rs*, 130 S.W.3d 619, 642 (Mo. App., W.D. 2004).

³⁴*Grace v. Missouri Gaming Comm'n*, 51 S.W.3d 891, 900-01 (Mo. App., W.D. 2001).

³⁵*Tendai v. Missouri Bd. of Regis'n for the Healing Arts*, 161 S.W.3d 358, 367 (Mo. banc 2005).

³⁶Section 333.121.2(13).


³⁷*Trieseler v. Helmbacher*, 168 S.W.2d 1030, 1036 (Mo. 1943).

and the Estate, as evidenced by the licenses and registrations under which they did business. We conclude that the Johnsons and the Estate are subject to discipline for violating that professional trust by failing to place preneed monies into trust accounts and retaining more than the law allowed.

Summary

The Johnsons and the Estate are subject to discipline under § 333.121.2(4), (5), (13), and (15).

SO ORDERED on June 14, 2006.


TERRY M. JARRETT
Commissioner